

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 8

GASH CONCRETE CONSTRUCTION CO.

Employer

and

OPERATIVE PLASTERERS' & CEMENT  
MASONS' INTERNATIONAL ASSOCIATION,  
LOCAL NO. 404

Case No. 8-RC-16332

Petitioner

and

BRICKLAYERS AND ALLIED CRAFTSWORKERS  
LOCAL UNION NO. 16

Intervenor

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.<sup>1</sup>

The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

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<sup>1</sup> The Petitioner filed a post-hearing brief that has been duly considered. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organizations involved claim to represent certain employees of the Employer. A

*All full-time and regular part-time employees of the Employer engaged in cement mason work; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.*

### **Issues**

There are two issues to be determined in this representation proceeding. First, does the Employer have any Section 9(a) contracts which present a bar to the instant proceeding. Second, whether the Bricklayers and Allied Craftworkers Local Union No. 16 should continue to be accorded intervenor status in this matter.

### **Facts**

The Employer is a concrete contractor engaged in the construction of commercial buildings with its business office located in Canton, Ohio. It employs a group of 12 employees including concrete masons, carpenters, and laborers. Six of the 12 employees are cement masons who constitute the core group of employees performing the masonry work. While the Employer's work has seasonal fluctuations, the same six cement masons have worked for the employer on a regular basis for at least the past two years. All of these core cement masons reside in Ohio.

The Employer performs work within Ohio and in other states, e.g., Texas, Kentucky, and West Virginia. The core group of employees travels to job sites outside the State of Ohio with the Employer. On occasion, a particular job may be too large for the core group, and then the Employer will hire additional men from the job site area. Five of the six core group employees are members of the Petitioner union. The remaining cement mason is a member of Operative Plasterers' and Cement Masons'

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question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

International Association, Local Union No. 109. The Petitioner seeks to represent a unit of cement masons employed by the Employer.

### **Employer's Collective Bargaining Relationships**

The Employer is party to several agreements purporting to cover a unit of cement masons. First, is the Petitioner's collective bargaining agreement with the Concrete Contractors' Association of Cleveland (the Association) effective from May 1, 1997 to April 30, 2001. The record reflects that a successor agreement has been reached, but that it is not yet typed in final form or executed. The Employer executed two relevant agreements with Petitioner: 1) Agreement and Contract of Participation and Acceptance of Local No. 404 Agreement; and 2) Agreement for Voluntary Recognition.<sup>2</sup> The Acceptance of Agreement reflects that the Employer agrees to be bound by the agreement between the Association and Local 404. There is no evidence that the Employer is a member of the Association. Both the Acceptance of Agreement form and the Association collective bargaining agreement are geographically limited by their own terms to Cuyahoga County. The Employer is also signatory to an Assent of Participation document thereby agreeing to abide by the Intervenor's collective bargaining agreement with The Northeast Ohio Contractors Association, effective from May 1, 1999 to April 30, 2002. The Employer has executed an Agreement for Voluntary Recognition with the Intervening union as well.<sup>3</sup>

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<sup>2</sup> The Employer also signed various agreements with Petitioner dealing with the pension plans and trust funds.

<sup>3</sup> The Employer's and Intervenor's Agreement for Voluntary Recognition provides, in pertinent part, as follows:

*The Union claims, and the Employer acknowledges and agrees after having reviewed authorization cards signed by at least a majority of the Employer's bargaining unit employees, that a majority of its employees have authorized the Union to represent them in collective bargaining.*

Finally, the Employer has executed a collective bargaining agreement with the Operative Plasterers' and Cement Masons' International Association Local Union No. 109, effective from June 1, 2001 to June 1, 2006. This agreement covers Carroll, Holmes, Medina, Portage, Stark, Summit, Tuscarawas and Wayne counties in Ohio.<sup>4</sup> The recognition issue of the contract provides, in part, that "The Employer further acknowledges that the Union has established to the satisfaction of the Employer that the Union represents a clear majority of the Employer's employees who perform work covered by this agreement."

### **Section 9(a) Relationships**

The Board recently refined the circumstances under which a recognition agreement or contract provision will establish a union's Section 9(a) status. According to the Board's decision in **Staughton Fuel & Material, Inc., 335 NLRB No. 59 (2001)**, a recognition agreement or contract provision will be independently sufficient to establish a union's 9(a) status where the language unequivocally indicates that (1) the union requested recognition as the majority or Section 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or Section 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support.

In the instant case, the voluntary recognition agreement executed between the Employer and the Petitioner in 1997 reflects that the Employer recognized the Petitioner after an examination of authorization cards established that it possessed majority support within the unit. Clearly, under the principles expressed in **Staughton Fuel, supra**, the

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<sup>4</sup> Local 109 did not appear at the hearing. On March 26, 2002, I sent a letter by facsimile to Local 109 advising it that if it wished to intervene in this proceeding it should so indicate by the close of business on

Petitioner has a 9(a) relationship with the Employer. It is equally clear that the Intervenor also has a 9(a) relationship with the Employer based upon the language of its voluntary recognition agreement.

While the Intervenor has a Section 9(a) agreement with the Employer, that agreement does not block the processing of the Petition. The expiration date of the Intervenor's contract with the Employer is April 30, 2002. The petition was filed on February 13, 2002, well within the 60 to 90 day window period permitting such filings.

**Leonard Wholesale Meats, 136 NLRB 1000 (1962).**<sup>5</sup>

As for the Employer's collective bargaining agreement with Local 109, I find that the recognition language is insufficient to establish 9(a) status under **Staughton Fuel** because it does not unequivocally state that the employer's recognition was based on the union showing, or having offered to show, evidence of majority support. Accordingly, I find that Local 109's contract is an 8(f) contract and consequently is not a bar to the instant petition. **John Deklewa & Sons, 282 NLRB 1375, 1387 (1987); Staughton Fuel.**

### **The Motion to Intervene Was Properly Granted**

The only remaining issue is whether the Bricklayers and Allied Craftworkers Local Union No. 16 (BAC, Local 16) should continue to be accorded intervenor status in this matter.<sup>6</sup> At hearing, BAC, Local 16 provided evidence that it is signatory to a

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Monday, April 1, 2002. No response was received from Local 109.

<sup>5</sup> While the petition herein appears to have been filed during the term of the agreement between the Petitioner and the Employer, a petition involving a recognized bargaining representative seeking certification during the term of its Section 9(a) agreement presents a long recognized exception to contract bar rules. **General Box Co., 82 NLRB 678 (1948).**

<sup>6</sup> At hearing, the Intervenor's position was that a unit described without geographic boundaries is inappropriate. After the hearing closed, the Intervenor withdrew its objection to the bargaining unit description. The Employer does not dispute the propriety of the petitioned for unit. I find that the

collective bargaining agreement with the Employer covering cement mason work. Based upon BAC Local 16's assertion and supporting documentation, the Motion to Intervene was granted. Petitioner objects to the Intervenor status, asserting that BAC, Local 16 represents none of the Employer's employees and the Employer has performed no work within the geographical limitation of the BAC agreement in the past two years.<sup>7</sup>

The Board's Casehandling Manual, Part Two, Representation Proceedings, Section 11022 sets forth four appropriate methods by which a party can establish the necessary showing of interest to participate in a representation proceeding.<sup>8</sup> In the instant case, BAC, Local 16 is party to a 9(a) contract covering certain employees of the Employer which expires April 30, 2002. Based on the foregoing, I hereby affirm the hearing officer's granting of the Motion to Intervene.

Since the Employer is engaged in the construction industry and the record reflects that the number of unit employees varies from time to time, the eligibility of voters will be determined by the formula set forth in **Daniel Construction Co., 133 NLRB 264 (1961)** and **Steiny & Co., 308 NLRB 1323 (1992)**.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of

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petitioned for unit is an appropriate unit since it consists of all of the Employer's employees engaged in cement mason work. See ***Alley Drywall, Inc.*, 333 NLRB No. 132 (2001)**.

<sup>7</sup> The BAC agreement applies to work performed in Lake, Geauga, and Ashtabula counties of Ohio.

<sup>8</sup> A union will be regarded as satisfying the showing requirement as a petitioner in a RC case or as an intervenor in a RC, RM, or RD case if:

- (a) it has submitted authorization cards or a list of signatures designating the union as the signers' agent for collective-bargaining purposes
- (b) it has submitted evidence from its records as to the individuals who are members of the union
- (c) it is the certified or currently recognized bargaining agent of the employees involved (in this circumstance, a union continues as a party, unless it disclaims interest in representing the employees involved (Sec. 11120))

election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Also eligible to vote are those employees who have been employed for a total of 30 working days or more within the period of 12 months immediately preceding the eligibility date for the election, or who have some employment in that period and have been employed 45 working days or more within the 24 months immediately preceding the eligibility date for the election, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.

Those eligible shall vote whether or not they desire to be represented by: (1) Bricklayers and Allied Craftworkers Local Union No. 16; or (2) Operative Plasterers' and Cement Masons' International Association Local Union No. 404; or (3) Neither.

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(d) it is the party to a currently effective or recently expired exclusive collective-bargaining agreement covering the employees involved in whole or in part.

### **LIST OF VOTERS**

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a\* list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **NLRB v. Wyman-Gordon Company**, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days from the date of this decision. **North Macon Health Care Facility**, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

### **RIGHT TO REQUEST REVIEW**

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by April 17, 2002.



**DATED** at Cleveland, Ohio this 3<sup>rd</sup> day of April, 2002.

/s/ Frederick J. Calatrello

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Frederick J. Calatrello  
Regional Director  
National Labor Relations Board  
Region 8

440-1700